IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1564

LORENE THOMPSON, Petitioner,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, Respondents.

REPLY BRIEF OF PETITIONER

The Respondents, in their Motion to Deny this Petition for Writ of Certiorari, in effect concede there has been here a serious severance of rights of property and liberty in violation of the most fundamental requirements of due process. (See Petition, 12-15) Despite this admission, they argue that no constitutional issue exists of which this Court should take cognizance since Petitioner's right to gain judicial redress from such violation of due process was effectively can-

celled and destroyed by the construction and application placed upon K.S.A. 60-2101(a) by the Kansas Supreme Court nearly three years after the severance of the Constitutional right, and in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the State Supreme Court's decision. (Petition, 15-22) Such a position, if permitted to prevail in any State of the Union, is so detrimental to the orderly administration of justice and so devastating to many of the most basic and precious rights of all American citizens that Petitioner feels compelled to summarize some of the more serious defects of the Respondent's diversionary arguments.

I. ALL AMERICAN CITIZENS WILL BE VITALLY AFFECTED BY THE OUTCOME OF THIS CASE.

Petitioner is truly a representative American citizen, in a sense we believe this Court rarely has before it, for the purposes of enforcement of crucial Constitutional rights of the vast majority of American citizens. The Constitutional right instantaneously severed in this case was that of the practice of a chosen profession as a civil servant in the field of Vocational Rehabilitation for which the Petitioner is well trained, experienced and qualified. (Petition, pages 49a-50a) In this sense, she represents most directly an amazing number of American citizens, one out of six presently employed by government at some level.[1] In a broader

[1] "Employment and Earnings," Volume 18, No. 11, May 1972, U.S. Department of Labor, Bureau of Labor Statistics.

sense she represents all American citizens as the increasing activity of government both federal and state pervades more and more the lives of all of us, giving rise to astronomical possibilities for abuse for which the Courts must maintain an effective and practically available means for obtaining correction and redress.

II. THE SCALES OF JUSTICE MUST NOT BE PERMITTED TO BE HEAVILY AND UNCONSCIONABLY WEIGHTED AGAINST THE INDIVIDUAL.

In this case the Court has a golden opportunity to demonstrate that it will not permit a State to destroy the citizen's equality in the scales of justice solely on account of its unlimited economic resources to litigate indefinitely against a lone citizen of moderate means.

The pertinent facts of this case are not in dispute. They are well documented and preserved in the RECORD ON APPEAL in the Kansas Supreme Court, a complete copy of which is on file with the Clerk of this Court. These facts are set forth in sequential form in Petitioner's Petition for Writ of Certiorari. (Pages 4-10) Some of the most salient facts were completely disregarded in arriving at the decision to deprive the trial Court of its equitable jurisdiction to grant relief for the unconstitutional dismissal of Petitioner from her classified civil service position. Some of these undisputed facts will be briefly traced to demonstrate that Petitioner was doing exactly what the law required of her. She was acting in good faith and with continuous conscientiousness to resolve the matter of her employment with the State, first administratively (Petition, pages 44a-46a), and when all administrative channels

had been exhausted to resort to the Court in a manner fully compliant with law irrespective of how the Supreme Court of Kansas finally decided to construe and apply K.S.A. 60-2101(a). (Petition, page 7)

First, it is an undisputed fact that on February 17, 1969, the Petitioner was summarily dismissed from her classified civil service position after 11 years of meritorious service. Since this action was taken without any advance notice, specification of grounds or opportunity to be heard, it is of course obvious that she was denied another substantial Constitutional right--the right to counsel. Respondents now attempt to obscure this critical fact by the erroneous statement that Petitioner was "advised and represented by counsel of her choice throughout." True, Petitioner did seek legal representation immediately after her dismissal and has continued henceforth to be represented by counsel. But the whole point is that all the most basic, fundamental due process rights including right to counsel were denied to Petitioner prior to the severance of the Constitutional rights. Thus, in the eyes of the employing agency, Board of Social Welfare, Petitioner became ipso facto only a former civil service employee of the State who could be frozen forever in such a state by ignoring all Petitioner's efforts to become reemployed by the State in some reasonable capacity.

The State agencies' argument that after the cutting off of the Constitutional right, Petitioner was afforded an opportunity to be heard is identical to that raised by New York in defending the policy

of cutting off welfare benefits without a prior hearing. This argument was rejected by this Court in Goldberg vs. Kelly, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287. Once the entitlement to government funds has been denied by the governmental agency, no matter how arbitrarily or illegally, the individual, whether he be a welfare recipient or a government employee, is placed at an intolerable disadvantage in obtaining remedial action either administratively or judicially.

Even the remedial relief which Petitioner sought immediately after her dismissal by appealing to the Civil Service Board under K.S.A. 75-2949 fell far short of providing many of the basic elements of due process. (See Petition, pages 51a-53a) But despite this glaring example of administrative unfairness to the individual, the Civil Service Board did approve of the action of the Board of Social Welfare in dismissing the Petitioner as supervisor only, but affirmed her right to be reemployed by the State as a Vocational Rehabilitation Counselor. It was so construed and acted upon by Petitioner which position was sustained by the trial court (Petition, page 44a) and insofar as Petitioner knew was accepted by the State agencies inasmuch as they never once during the year gave notice that she was being totally dismissed from state service. In fact the record establishes that she was simply "given the run around," (Petition, page 44a) until the final letter of the Personnel Division establishing for the first time that the State had no intention of rehiring the Petitioner. (RECORD ON APPEAL, pages 27 and 38-40) This action was contrary to the obvious intent of the Civil Service Board ruling of April 3, 1969. For this reason, Petitioner sought rehearing and

review of the administrative disobedience of this ruling, which request was summarily denied. (Petition, page 78a) This final action of the Civil Service Board clearly represented the point of exhaustion of administrative remedies and the final ruling of the "quasi-judicial" tribunal from which the Petitioner did appeal under K.S.A. 60-2101(a) within the designated thirty-day period. (Petition, page 7; RECORD ON APPEAL, page 30-31) This direct appeal action was totally ignored by the Kansas Supreme Court in its ruling that Petitioner had not complied with the "exclusive remedy" requirements of K.S.A. 60-2101(a). The obvious and astounding lesson to be learned from such a ruling is that the Supreme Court of Kansas has for all intents and purposes abolished the salutary principle of Exhaustion of Administrative Remedies. If THOMPSON v. AMIS is allowed to stand, any citizen confronted with an administrative action of <u>any</u> kind at <u>any</u> stage, which at some future time might be construed to be a "quasi-judicial" action, must immediately jump into Court with a direct K.S.A. 60-2101(a) appeal or forever lose his right to seek judicial correction of the administrative error.

III. THE RELIEF GRANTED TO THE PETITIONER BY THE TRIAL COURT FROM A GROSS MISCARRIAGE OF JUSTICE AFTER THIRTEEN MONTHS OF A CAREFULLY AND COMPETENTLY CONDUCTED JUDICIAL DUE PROCESS PROCEEDING MUST NOT BE PERMITTED TO BE CANCELLED BY AN APPELLATE DECISION WHICH DISREGARDS SOME OF THE MOST SALIENT FACTS OF THE CASE, WHICH CONSTRUES A STATE STATUTE UNCONSTITUTIONALLY, AND

WHICH ESTABLISHES A NEW RULE, APPLYING THE SAME RETROACTIVELY ON ITS OWN MOTION IN TOTAL CONTRADICTION TO THE CLEAR, COMMITTED AND UNAPPEALED POSITION OF THE STATE IN ALL ITS CAPACITIES. (Petition, pages 18-22)

The Respondents' only argument in opposition to this point is that, since K.S.A. 60-2101(a) was enacted prior to Petitioner's dismissal it provided a "totally adequate and known statutory remedy." The clear, detailed factual record of this case establishes precisely the opposite. K.S.A. 2101(a) was not even a known, much less an adequate remedy available to this Petitioner. At the time in question, there was absolutely no case law in existence which would provide an inkling that the Supreme Court would interpret K.S.A. 2101(a) in the fashion that it did in this case. (See the Dissenting Opinion of Justice Owsley, Petition, page 12a) It is sheer double-talk for the involved state agencies to contend that the Statute was known or available at all for obtaining judicial correction of illegal rulings of the Civil Service Board at the time of Petitioner's dismissal, February 17, 1969; on the date of the first Civil Service Board ruling, April 3, 1969; on the date of the second Civil Service Board ruling, May 11, 1970; or at any time at all prior to the Supreme Court ruling of January 22, 1972, declaring the statute to be both applicable and exclusive.

See RECORD ON APPEAL, pages 35 and 36 for another case ironically involving the primary state agency here, the Board of Social Welfare, in which the District Court specifically held that the Court lacked jurisdiction to entertain a K.S.A. 2101(a)

appeal from the Civil Service Board. Not only did respondent, Board of Social Welfare, fail to appeal from the ruling in this former case, but as its first line of defense in the K.S.A. 2101(a) appeal filed by Petitioner in this controversy, lodged a Motion to Dismiss, contending that the District Court "has no jurisdiction to hear an appeal from the Civil Service Board of the State of Kansas." (RECORD ON APPEAL, page 36) See further RECORD ON APPEAL, pages 40-53 conclusively establishing that both respondent state agencies committed themselves to the explicit position that the Petitioner's direct appeal under K.S.A. 2101(a) should be dismissed "on the basis that the Court lacks jurisdiction to hear an appeal from the State Civil Service Board under the provisions of K.S.A. 2101(a)." (RECORD ON APPEAL 52-53) This position was adopted by the Court on the basis of such stipulation and journalized in a Court order under date of July 17, 1970, (RECORD ON APPEAL 52-53), which order remains to this day unappealed from by the respondents. Respondents appealed to the Supreme Court of Kansas only from the June 30, 1971, Order of Summary Judgment granting Petitioner judgment on the merits. (RECORD ON APPEAL, page 119) The Record is clear, therefore, that such judgment was overturned by the Supreme Court of Kansas solely on its own motion and in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the pendency before the Kansas Supreme Court.

This Court has ample authority, and we humbly, but earnestly, urge that it has a Constitutional duty to strike down such duplicity on the part of state government when important United States Constitutional

rights are involved. See the cases of Glus v. Brooklyn Eastern Terminal, 359 US 231; 79 S Ct 760; 3 L Ed 2d 770 and Raley v. Ohio, 360 US 423; 79 S Ct 1257; 3 L Ed 2d 1344, discussed at pages 21 and 22 of the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons presented as direct rebuttal to Respondents' Motion to Deny, and for all the reasons heretofore set forth in Petitioner's Petition for Writ of Certiorari to the Supreme Court of Kansas filed on May 31, 1972, Petitioner prays that a Writ of Certiorari to the Supreme Court of Kansas be issued by this Court.

Respectfully submitted,

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